

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LYNN NOYES,)
)
 Plaintiff,) 2:02-cv-2685-GEB-CMK
)
 v.) ORDER
)
KELLY SERVICES, INC.,)
a corporation,)
)
 Defendant.)
)

On February 4, 2008, Defendant moved to exclude the testimony of Plaintiff's expert Rick Ross under Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993). (Mot., Dkt. No. 5.) Plaintiff opposes the motion. A Daubert hearing was held on March 17, 2008.¹ See Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (holding Daubert reliability determination applies to all expert testimony).

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¹ The hearing addressed, among other things, the following questions: (1) Is Mr. Ross qualified to testify as an expert in the field of destructive cults in general and of the nature, relationships and group dynamics of the Fellowship of Friends in particular? (2) Are Mr. Ross's opinions based on a sufficient, reliable foundation – sufficient facts, data or experience? Does he rely on materials of a type reasonably relied on by other experts in the field? (3) Is there a reasonable link between the information and procedures Mr. Ross uses and his conclusions? (Order, March 5, 2008.)

BACKGROUND

In 1995, Plaintiff was hired as a Software Developer in Defendant's Nevada City, California office. (Compl. ¶ 13.) Plaintiff alleges that William Heinz, Vice President in charge of the office, is a member of a small religious organization called Fellowship of Friends ("the Fellowship" or "FOF"). (*Id.* ¶ 16.) Plaintiff further alleges that in April 2001, "Defendant denied Plaintiff equal opportunity to compete for the position of Software Development Manager and selected another person who has lower qualifications who is also a member of the Fellowship." (*Id.* ¶ 27.) On December 18, 2002, Plaintiff filed a Complaint against Defendant alleging, *inter alia*, employment discrimination "because of Plaintiff's religion" in violation of Title VII of the United States Civil Rights Act of 1964, as amended Title 42, U.S.C. § 2000e *et seq.* (*Id.* ¶ 1.)

LEGAL STANDARD

16 Rule 702 of the Federal Rules of Evidence governs the
17 admissibility of expert testimony.² Rule 702 prescribes:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

25 District courts have a gatekeeping duty to screen expert testimony to
26 ensure that it is relevant and reliable. Daubert, 509 U.S. at 597;

² All subsequent references to Rules are to the Federal Rules of Evidence.

Kumho Tire, 526 U.S. at 141. The proponent of expert testimony has the burden of establishing this foundation by a preponderance of the evidence. United States v. Gwaltney, 790 F.2d 1378, 1382 (9th Cir. 1986); Bourjaily v. United States, 483 U.S. 171, 175 (1987). The focus of the court is on whether Plaintiff meets her burden. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 595.

DISCUSSION

I. Field of Expertise

Defendant argues "Mr. Ross' field of expertise – the study of religious cults and coercive persuasion – [is], as a matter of law, insufficiently scientific to be presented to a jury." (Mot. at 4:24-5:1 (citing Daubert v. Merrell Dow Pharm. (Daubert II), 43 F.3d 1311, 1315 (9th Cir. 1995); United States v. Fishman, 743 F. Supp. 713, 716, 723 (N.D. Cal. 1990))). Plaintiff rejoins she plans on having Mr. Ross testify on "the nature, relationships and group dynamics of the Fellowship" and "[e]xpert testimony is routinely admitted on the structures of businesses and organizations." (Opp'n at 11:5-7; 8:13-15 (citing United States v. Anderson, 446 F.3d 870, 875 (8th Cir. 2006))). Plaintiff argues "Mr. Ross will give evidence about the Fellowship that will assist the jury in understanding [the Fellowship's] dynamics without testifying as to whether its adherents have been subject to [coercive persuasion]." (Opp'n at 7:20-23.)

Rule 702 does not require that all expert testimony be based on a science; it explicitly allows expert testimony to be based on "specialized knowledge." Fed. R. Evid. 702. Nonetheless, "the

1 discipline itself [must not] lack[] reliability, as for example, do
2 theories grounded in any so-called generally accepted principles of
3 astrology or necromancy." Kumho Tire Co., 526 U.S. at 151. Testimony
4 must be "the product of reliable principles and methods . . ." Fed.
5 R. Evid. 702.

6 At the Daubert hearing on March 17, 2008, Mr. Ross gave
7 testimony on the principles and methods of the study of controversial
8 organizations and destructive cults. Mr. Ross testified there is no
9 official discipline of cultic studies but there is a general consensus
10 among a network of people who study cults (including academics, mental
11 health professionals, and law enforcement officers) of the principles
12 used to identify what makes a group a destructive cult. He testified
13 that one of the seminal works in the field is a 1981 paper published
14 by Robert J. Lifton, M.D. called Cult Formation, in which Lifton
15 describes three defining criteria of destructive cults: (1) a living
16 leader who becomes the object of worship; (2) a process of
17 indoctrination and undue influence over members that leads to an
18 inability to think independently; and (3) the group does some harm,
19 such as financial exploitation. See Robert J. Lifton, M.D., Cult
20 Formation, 7 The Harvard Mental Health Letter, no. 8 (Feb. 1981). Mr.
21 Ross testified that another leader in the field was Margaret Singer,
22 Ph.D., an adjunct professor of psychology at the University of
23 California, Berkeley.

24 Mr. Ross further testified that when determining whether a
25 particular group could be called a destructive cult, he uses the
26 Lifton criteria, principles he learned from Dr. Singer and other basic
27 warning signs. In making this determination, Mr. Ross relies on web
28 sites that archive information about a group, court documents, reports

1 in newspapers, testimony of former members, and writings by the group
2 itself. To make sure his opinions are accurate, Mr. Ross looks for an
3 intersection of information in which these various sources corroborate
4 each other. Ross testified that other experts in the field use
5 similar principles and methods to support their opinions about
6 destructive cults.

7 Defendant argues, relying on Fishman, 743 F. Supp. at 713,
8 that Mr. Ross' field of study is insufficiently scientific. The
9 Fishman court excluded expert testimony, based on "thought reform
10 theories," that religious "cults overcome the free will of their
11 members" through coercive persuasion. 743 F. Supp. at 716, 718, 720.
12 However, Plaintiff rejoins that she will not elicit testimony from Mr.
13 Ross on "thought reform and mind control and whether the fellowship
14 uses it on its members." (Opp'n at 10:23-26.)

15 Evidence presented by Plaintiff at the Daubert hearing is
16 sufficient to demonstrate that the study of destructive cults is not
17 an unreliable discipline. See People v. Viera, 35 Cal. 4th 264, 307
18 (2005) ("[T]he subject of cult behavior [is] one beyond common
19 knowledge and [can] suitably be addressed by an expert opinion.");
20 Scott v. Ross, 140 F.3d 1275, 1285-86 (9th Cir. 1998) (discussing
21 admission of expert testimony on the "history and general practice of
22 deprogramming and the origin and practices of the 'anti-cult
23 movement'"). In addition, the methods described by Mr. Ross are
24 sufficiently reliable to support his proffered opinions on the
25 structure and practices of FOF and satisfy the requirement in Rule 703
26 that data upon which the expert relies be "of a type reasonably relied
27 upon by experts in the particular field." Fed. R. Evid. 703.

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1 I. Expert Qualifications and Reliable Foundation

2 Defendant argues that Mr. Ross is not qualified to testify
3 as an expert regarding the "Fellowship of Friends as well as the
4 specific motivations of individual adherents, specifically about the
5 motivation of former Kelly employee (and Ms. Noyes' supervisor)
6 William Heinz" (Mot. at 6:7-11.) At the Daubert hearing,
7 Plaintiff responded, notwithstanding opinions in Mr. Ross' expert
8 report regarding what motivated Mr. Heinz, Mr. Ross will not provide
9 those opinions at trial and his trial testimony will regard

10 the group dynamics at the Fellowship of Friends.
11 He's going to testify to the cohesiveness and
12 group loyalty. He's going to testify to the
13 strong dominance and authoritarianism of the
14 leader of the group, and how that dictates
15 behavior within the group, and attitudes, etc. He
16 will testify to the religious nature of the group.

17 Defendant argues "Mr. Ross has no special educational
18 background, skills or training. . . . He has also never been
19 published by a scientific or peer review journal. . . . Mr. Ross has
20 never been qualified in, or even retained for, any type of employment
21 dispute anywhere." (Mot. at 6:13-7:1 (emphasis in original).)
22 Defendant further argues that Mr. Ross "lacks foundation to testify
23 here as required by [Daubert] because "the sum total of Mr. Ross'
24 'expertise' about the Fellowship, derives from Mr. Ross' review of Ms.
25 Noyes' [C]omplaint, his conversations with her counsel, and perusing
26 of newspaper articles and anonymous 'blogs' on the internet." (Id. at
27 7:6-18.) Plaintiff rejoins that Mr. Ross "has specialized knowledge
28 about the Fellowship of Friends [and] general knowledge about cults
and controversial organizations" (Opp'n at 11:13-24.)

29 An expert may be qualified either by "knowledge, skill,
30 experience, training or education." Fed. R. Evid. 702. Rule 702

1 "contemplates a broad conception of expert qualifications." Thomas v.
2 Newton Int'l Enters., 42 F.3d 1266, 1269 (9th Cir. 1994). An expert
3 need not possess a professional degree or certification. See United
4 States v. Majors, 196 F.3d 1206, 1215 (11th Cir. 1999) (finding expert
5 not required to be a certified accountant to testify as a financial
6 expert). Expert testimony must rest on a "reliable foundation
7" Daubert, 509 U.S. at 597.

8 Defendant supports its argument that Mr. Ross is unqualified
9 by citing United States v. Miller, 874 F.2d 1255, 1268 (9th Cir.
10 1989), in which the court held that an expert was unqualified to
11 testify about KGB recruitment practices because he "lacked significant
12 practical experience in the field and had not made any special study
13 of the subject." However, Mr. Ross has made a "special study of the
14 subject" of cults, including the Fellowship of Friends.³ He has
15 studied and researched controversial organizations and cults since
16 1982. In 1996, he founded the Ross Institute of New Jersey, an
17 "organization devoted to public education and research regarding
18 destructive cults, controversial groups and movements." (Expert
19 Report at 1.) As the executive director of the Ross Institute, Mr.
20 Ross monitors news stories, court documents and reports about
21 controversial groups on a daily basis and archives such materials on
22 the Ross Institute web site. He responds to phone calls and emails
23 from concerned family members and former and current members of groups
24 catalogued in his archive. Mr. Ross has been a consultant for law
25 enforcement at the local and federal level and has lectured by

27 ³ The following summary is taken from Mr. Ross' expert witness
28 report (Decl. of Robert Burch in Opp'n to Def.'s In Limine Mot. No. 1,
Ex. 1 ("Expert Report")) and his sworn testimony at the Daubert hearing
on March 17, 2008.

1 invitation at several universities. He has been "gathering
2 information about the Fellowship of Friends specifically since 1996[;]
3 archiving reports and articles at the Ross Institute database and
4 additionally receiving and handling repeated complaints from families,
5 former members and others concerned about the cult's activities."
6 (*Id.* at 2.) This experience and knowledge is sufficient to allow Mr.
7 Ross to give the testimony Plaintiff proffers subject to Rule 403
8 considerations. See Viera, 35 Cal. 4th at 307 (discussing trial
9 court's finding that retired deputy sheriff was qualified to testify
10 as expert on cults).

11 Mr. Ross bases his testimony about the "level and extent of
12 FOF commitment regarding personal assets, income and labor" on "press
13 reports, [and] the accounts of former and current members [given in]
14 interviews. Dozens of families over the years have related the same
15 consistent pattern of total commitment when discussing the group, its
16 influence and impact upon a family member's life." (Expert Report at
17 2.) At the Daubert hearing, Mr. Ross also discussed relying on Dr.
18 Singer's writing about FOF, pronouncements by FOF on their own web
19 site, press reports about FOF, and court records from lawsuits in
20 which FOF has been involved. Mr. Ross also conducted extensive
21 interviews of two former prominent members of FOF in the mid 1990s.

22 This is a sufficient and reliable basis for the Ross
23 opinions Plaintiff proffers, and, as discussed *supra*, Mr. Ross'
24 sources are of a type reasonably relied on by experts in the field.
25 See also United States v. Elkins, 885 F.2d 775, 786 (11th Cir. 1989)
26 (holding expert in Libyan history could testify regarding who was the
27 commander-in-chief of Libyan armed forces based on press reports.) In
28

1 addition, Mr. Ross' proffered opinions are reasonably linked to the
2 information on which Mr. Ross relies.

3 III. Relevancy and Province of the Jury

4 Defendant argues "[t]he only relevant testimony is whether
5 [Ms. Noyes] was qualified for the promotion and whether, in fact,
6 Kelly purposefully denied her that promotion for an unlawful reason.
7 Testimony concerning the Fellowship (and the beliefs, motivations and
8 practices of its adherents) simply has no relevancy to this trial."

9 (Mot. at 8:14-19.) Defendant further argues

10 courts have long recognized that jurors are
11 perfectly capable of assessing human motivations,
12 and thus have excluded expert testimony regarding
13 such topics. . . . Here, there is nothing
14 remotely uncommon about the notion that an
individual might seek to help another person from
the same social, academic, religious or
professional circle, among other groups.

15 (Id. at 9:10-20; 10:1-3 (citing Kotla v. Regents of the Univ. of Cal.,
16 115 Cal. App. 4th 283, 293 (2004))). Plaintiff rejoins that Mr. Ross'
17 testimony is relevant: "Plaintiff alleges that she was denied the
18 promotion in question because . . . William Heinz showed religious
19 favoritism toward a fellow member of the Fellowship of Friends and
20 discriminated against her for her non-membership. . . . [Therefore,
21 t]he ultimate issue is whether [Plaintiff] was the victim of
22 intentional discrimination." (Opp'n at 3:7-19.) Plaintiff argued at
23 the Daubert hearing that "what Mr. Ross is testifying [to is] the
24 nature of the religious organization in which Mr. Heinz and Mr.
25 Jilesen, the person promoted to the job, shared common membership.
26 Instead of just presenting evidence to the jury of common membership,
27 we want to present some evidence to the jury of what was the nature of
28 the organization in which the common membership exists" because

1 common group membership . . . could motivate a
2 person to discriminate in favor of a member and
3 against a non-member in a hiring decision. It is
4 likely however that most jurors will have no
5 knowledge of the Fellowship of Friends
6 Thus the average juror can be assisted in
7 understanding the evidence in weighing the degree
8 to which common membership could affect the
9 motivation of a member who had hiring power over a
10 member

11 (Opp'n at 4:23-5:6.)

12 "Relevant evidence" means evidence having any tendency to
13 make the existence of any fact that is of consequence to the
14 determination of the action more probable or less probable than it
15 would be without the evidence." Fed. R. Evid. 401. An expert opinion
16 may be admitted only "[i]f scientific, technical or other specialized
17 knowledge will assist the trier of fact to understand the evidence or
18 to determine a fact in issue . . ." Fed. R. Evid. 702. "Testimony
19 from an expert is presumed to be helpful unless it concerns matters
20 within the everyday knowledge and experience of a lay juror." Kopf v.
21 Skyrm, 993 F.2d 374, 377 (4th Cir. 1993).

22 Mr. Ross' testimony regarding the structure and practices of
23 FOF will provide evidence from which inferences could be drawn that
24 have probative value on Plaintiff's assertion that the promotion
25 decision was motivated by religious discrimination based on FOF's
26 membership. The average juror would not be well versed in FOF's
27 structure and practices. See United States v. Locascio, 6 F.3d 924,
28 937 (1st Cir. 1988) (upholding the use of expert testimony on "the
structure and methods of organized crime families" because "jurors are
not well versed" in the subject); Ams. United For Separation of Church
& State v. Prison Fellowship Ministries, 432 F. Supp. 2d 862, 873-75
(S.D. Iowa 2006) (admitting evidence of "theological views and

1 practices" of para-church, mission-minded organization and "strong,
2 associated characteristics" of Evangelical Christians) (rev'd on other
3 grounds, 509 F.3d 406 (8th Cir. 2007)); United States v. Mulder, 273
4 F.3d 91, 101 (2nd Cir. 2001) (admitting evidence of structure, history
5 and tactics of labor coalition). Therefore, this evidence is relevant
6 and will assist the jury.

7 IV. Undue Prejudice

8 Defendant seeks exclusion of Mr. Ross' testimony under Rule
9 403 arguing "Mr. Ross' testimony about, among other things,
10 'destructive cults' and 'mind control,' are precisely the kind of
11 evidence that will inevitably infect the jury's determination with
12 passion and emotion." (Mot. at 1:14-28.) Plaintiff rejoins that Mr.
13 Ross' testimony "will be highly relevant on the dynamics of the
14 Fellowship of Friends from which certain motives and intentions,
15 arising out of common membership, can be inferred [and] can be
16 presented in a manner to assist the jury in understanding motive and
17 intent without arousing undue prejudice." (Opp'n at 13:23-14:8.)

18 Under Rule 403, relevant evidence may be excluded "if its
19 probative value is substantially outweighed by the danger of unfair
20 prejudice." "'Unfair' prejudice . . . means an undue tendency to
21 suggest decision on an improper basis, commonly, though not
22 necessarily, an emotional one." Fed. R. Evid. 403 Advisory Comm. Note
23 (1972).

24 Defendant has not shown that Mr. Ross' proffered testimony
25 on FOF's structure and practices should be excluded under Rule 403.
26 However, evidence of Robert Burton's alleged sexual encounters has low
27 probative value and is excluded.

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1 Defendant also argues that Rule 403 is violated by
2 Plaintiff's alleged strategy to "offend and prejudice the jury with
3 the Fellowship's purported beliefs and characteristics while
4 simultaneously associating Kelly with the Fellowship" because such
5 evidence constitutes impermissible stereotyping in violation of the
6 Ninth Circuit's ruling in Jinro Am. Inc. v Secure Invs., Inc., 266
7 F.3d 993, 1007 (9th Cir. 2001). (Mot. at 11:9-20.) In Jinro, the
8 Ninth Circuit held that

9 [a]llowing an expert witness in a civil action to
10 generalize that most Korean businesses are
11 corrupt, are not to be trusted and will engage in
12 complicated business transactions to evade Korean
currency laws is tantamount to ethnic or cultural
stereotyping, inviting the jury to assume that the
Korean litigant fits the stereotype.

13 266 F.3d at 1007. In Jinro, however, the Ninth Circuit recognized
14 that testimony "about cultural traits or behavior . . . is not
15 inherently prejudicial" and may be used as "informative testimony" so
16 long as it is an "academic, non-inflammatory explanation" that is not
17 "the kind of guilt-by-ethnic association testimony condemned by this
18 and other courts."⁴ Id. at 1009. It is clear that this Jinro

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20 ⁴ In discussing this distinction with regards to religious
stereotyping, the court stated

21 in *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000),
22 we held that although testimony about Sikh
23 religious attitudes towards marriage and divorce
24 was proper to explain the defendant's motive to
kill, the state prosecutor committed constitutional
error by arguing such evidence showed "that all
25 Sikh persons (and thus Bains by extension) are
irresistibly predisposed to violence when a family
member has been dishonored ... and also are
completely unable to assimilate to and to abide by
the laws of the United States." The prosecutor's
26 "inflammatory" argument was "more a statement about
27 the stereotypical 'nature' of a particular group
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(continued...)

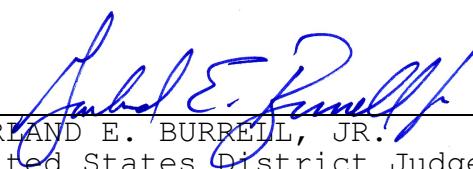
1 principle must be followed, but its application to Mr. Ross' proffered
2 testimony is unclear at this point in light of how the Plaintiff
3 limited the testimony Mr. Ross will give at trial.

4 SUMMARY

5 For the stated reasons, Defendant's motion to exclude the
6 testimony of Plaintiff's expert Rick Ross is denied in part and
7 granted in part.

8 IT IS SO ORDERED.

9 Dated: March 20, 2008

10 
11 GARLAND E. BURRELL, JR.
12 United States District Judge

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24 _____
25 ⁴(...continued)

26 rather than an explanation of the beliefs followed
27 (to different degrees and in different ways) by
28 some members of that group," thus inviting the jury
impermissibly to infer that Bains was compelled to
kill simply because he was a Sikh.

Jinro, 266 F.3d at 1007-08 (citations omitted).